



# Human Rights Law: Australia and Slovenia

Robert Walters<sup>1</sup> · Arne Mavcic<sup>2</sup> · Matt Harvey<sup>1</sup>

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## Abstract

The human rights legal framework of Australia and Slovenia are vastly different. This article explores the evolution of human rights laws of Slovenia and Australia. While the study and comparison of Australia and Slovenia is uncommon, and not often used as an example to highlight aspects of human rights, both states have a long history of cooperation. The first Slovenian reportedly arrived in Australian in 1855. Since then, and particularly following World War Two, there has been a steady stream of Slovenian's migrating to Australia. Slovenia upon independence prepared a new constitution that reflected the democratic human rights of the European Union, in 1991, and ratified the European Convention on Human rights in 1994. This article highlights how the opportunity Slovenia had to develop a new constitution, they were able to include many human rights that are often found in legislation. Australia's constitution came into effect in 1901. Being more than 100 years old, there has been no attempts to revise the Australian constitution and expand the current express human rights. This article will determine whether the European Union's human rights laws have not only influenced Slovenia's human rights laws, but also Australia's. This article suggests that Australia has much to learn from the Slovene experience, but is constrained by its constitution and region. This article highlights how a state formed in recent times, has had the opportunity to develop a constitution that reflects modern day human rights while an older state with longer established democracy has fallen behind in its protection of human rights.

**Keywords** Australian · Constitution · Human rights · Slovenia

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✉ Robert Walters  
Robert.Walters2@live.vu.edu.au

Arne Mavcic  
amavcic@concourts.net

Matt Harvey  
Matt.Harvey@vu.edu.au

<sup>1</sup> Victoria University, Melbourne, Australia

<sup>2</sup> European Faculty of Law, The New University, Nova Gorica, Slovenia

## Introduction

Australia and Slovenia's legal framework in relation to human rights are very different. Their respective beginnings differ greatly and have had a significant influence as to how both countries have viewed and adopted human rights. Even so, there are similarities in the way the Slovenes, before they became part of the Kingdom of Yugoslavia, and the Indigenous Aboriginals of Australia had their human rights suppressed by being excluded from society and the polity. Firstly, Australia was occupied by settlers, from the British Empire and was democratically governed from the 1850s to the exclusion of the indigenous population. This formed part of Australia's early national identity. Slovenia has inherited the Germanic civil law from its time as a province of the Austro-Hungarian Empire. From 1919 to 1991, Slovenia was part of a succession of Yugoslav states, whereby they suffered Nazi occupation in the Second World War, then was under communist rule from 1945. After the death of the Yugoslav leader Tito, Yugoslavia was increasingly federalized such that when Slovenia was able to secede in 1991, it was already a Republic within the Yugoslav Federal Republic. Although the "Glorious Revolution" of 1688 had led to the legislation of a Bill of Rights, common law continued to be the main source of rights. The union of England and Scotland formed the United Kingdom in 1707 combined the common law of England with the civil law of Scotland, but it was English common law that colonists took with when they settled new lands.

When the First Fleet arrived in Sydney<sup>1</sup> Cove in 1788<sup>2</sup> to establish the British colony of New South Wales, it also brought the common law to Australia. Van Diemen's land was established as a separate colony in 1824, Western Australia in 1827, South Australia in 1836, Victoria in 1851 and Queensland in 1859. Australia was then federated as the Commonwealth of Australia in 1901. The federal constitution was a combination of British and American ideas, but while some American principles of federalism were adopted, a Bill of Rights was not. Apart from the wish to deny equal rights to the indigenous inhabitants and other non-white races, the founders believed that common law generally provided sufficient rights protection. Australia's history saw the application the doctrine *terra nullius* imposed over the territory, which had enormous ramifications to the indigenous people. Adopting this legal principle paved the way for the British to claim right to the land as it was deemed not to be inhabited by anyone. The doctrine formed the basis for racial exclusion of the indigenous peoples. While there have been some improvements in their position, discussed below, it is arguable that Australia's indigenous people are still being denied some basic human rights.

This paper highlights the evolution and development of human rights in the two states. "World war I" section looks at how human rights were influenced as a result of World War I. "World war two (WWII)" section highlights how human rights took hold following WWII. "European Union" section discusses how when Slovenia became an independent state and a member of the European Union, Slovenia

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<sup>1</sup> Scott (1916, pp. 3–91).

<sup>2</sup> Richards (1987, p. 1609).

was obliged to implement the European legal framework. This had an enormous impact on Slovenia, because the state would be accountable to the supranational polity for human rights, amongst other policy issues. “Rights and freedoms” section provides an overview of the rights and freedoms expressed in the respective states laws. “Dignity, freedoms, citizens’ rights, equality and justice” section highlights some examples of how both states have expressed rights in their national laws, this includes, dignity, freedoms, citizens’ rights, equality and justice. “Religion” section, provides a brief look at how religion has influenced human rights in Slovenia and Australia. The paper predominantly focuses on how people within the territories have been excluded by the law, resulting in forms of discrimination. The paper does not look at the broader implementation and practical implication of human rights law in both states.

The exclusionary policy in Australia would also become evident between 1851 and 1890, at the time of the gold rushes. During the same period, all colonies agreed to restrict the entrance of Asian, particularly Chinese people into the territory. By 1859 it was estimated there were more than 42,000 Chinese people in Victoria.<sup>3</sup> The *Constitutional Bill of 1891* could have brought together the colonies as a federated state. However, by 1897, the exclusion of indigenous peoples was further extended by the introduction of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Vic)*. The laws segregated Aborigines and Torres Strait Islander people by excluding them from being British subjects to becoming wards of the state.<sup>4</sup> The power provided by the law enabled government authorities to remove Aboriginal people and place them on a reserve.<sup>5</sup> This early legal and policy approach set the tone and policy discourse of racial discrimination and exclusion for the indigenous peoples.

In 1901, Australia was federated and the first Australia Constitution came into effect. The Commonwealth obtained the power to make racist laws under section 51 (xxvi) but only for races *other than the aboriginal race in any State, for whom it is deemed necessary to make special laws*. This was a further reinforcement from colonization, the racial tone and racial exclusion that Australia’s founding fathers had towards the original inhabitants, but also that the States insisted on continuing to regulate their indigenous populations. Australia also adopted a racial approach to who would be considered as part of the Australian polity through the “White Australian Policy”. This exclusionary approach would go on to dominate the human rights landscape for decades for decades. During the same period but on another continent, Slovenes were having their own struggle for recognition within the wider territory of the Austrian Empire, which would collapse in 1919. Matija Majar (a Carinthian, Slovenian Catholic priest) would attempt to establish a Kingdom for Slovenes [Slovenian: Zdržena Slovenija] in their own right in 1848.<sup>6</sup> However, a Kingdom was not successfully proclaimed. In an attempt to establish a Kingdom,

<sup>3</sup> Rubenstein (2002, p. 27).

<sup>4</sup> Reynolds (2003, pp. 20–24).

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

Majar<sup>7</sup> wrote ‘What We Slovenians, Demand is to unite and have a general local assembly. The Slovenian language in the Slovenian region must have the same rights as German has in German regions and Italian in Italian regions. Slovenians are free to introduce the Slovenian language to all institutions, universities and secondary schools whenever they choose. Each civil servant must learn the Slovenian language before being appointed to a civil institution in Slovenian regions. In each high school in Slovenia, Slovenian language teachers must understand all Slavic dialects. Slovenes do not want to be in the German alliance, they are loyal to their emperor and constitutional government. Any alliance with the Germans (outside Austria) would obviously hurt us, they would dominate us with the German language and culture, take over our cities, then our castles and finally our fields and vineyards, as this has already happened in some areas.’<sup>8</sup> Thus, this highlighted the plight of the Slovene people, who, in the same way as the Aboriginal people of Australia, were struggling with being formally recognized. The exclusionary approach taken in both regions was important to the consciousness of the minority groups who were inhabitants on the territory, under the leadership of others. Not only were minority groups and indigenous peoples excluded from the polity, they were excluded from nearly all aspects of society. However, and while out of scope of this paper, the regions within the Austrian Hungarian Empire were separated by laws, which did allow some Slovenes to use their language. For example, in the Hungarian territory there were laws allowing Slovenes to use their language and adopt their culture. By contrast, Australian indigenous languages were suppressed and there was no thought given to their recognition.

## World War I (WW I)

WW I began in July 1914 and concluded in November 1919. The Austrian-Hungarian, German and Ottoman Empires all disintegrated. The internal borders of Europe were redrawn. During WW I the Slovenians sought to align themselves with the South Slavs who spoke similar languages.<sup>9</sup> The Slovenes and Croats, by joining the South Slav alliance would be granted greater autonomy in the new Kingdom.<sup>10</sup> This would shape the human rights of the Slovene people significantly. The May Declaration of 1917 demanded the unification of the Slovenes, Croats and Serbs (three peoples) residing under Habsburg rule to be under a single constitutional entity, united with the existing Kingdom of Serbia.<sup>11</sup> Two years later, in July 1917, the Corfu Conference and Declaration led to the formation and unification of the Kingdom of Serbs, Croats and Slovenes.<sup>12</sup> Importantly, the Corfu Declaration was considered

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<sup>7</sup> Vasiljevna (2011, pp. 9–26).

<sup>8</sup> Ibid.

<sup>9</sup> von Hirschhausen (2009, pp. 551–573).

<sup>10</sup> Bagwell (1991, pp. 489–499).

<sup>11</sup> Mavčič (2009, p. 10).

<sup>12</sup> Frucht (2005, pp. 420–430).

to be a legal agreement between the Yugoslav Committee and the Ravai Serbian Government, attempting to be a final settlement on the political form, function and organization of the new Kingdom.<sup>13</sup> The Kingdom evolved and would change its name several times and became the Kingdom of Yugoslavia in 1929. The 1921 Vidovdan Constitution and 1931 Yugoslav Constitution recognized the autonomy of the Slovenes and other nationalities of the Kingdom. The influence these constitutions had towards the rights of Slovenes was enormous. During the 1920s, the autonomy of Australia and the other self-governing Dominions of the British Empire was clarified, culminating in the Statute of Westminster 1931 (Imperial) under which Britain undertook not to legislate for the Dominions except at their request. For the first time their autonomy, language, culture and values had finally been accepted in daily life and the institutions of the Kingdom. However, this would be short lived and World War Two began bringing chaos across Europe. The Second World War was also constitutionally significant for Australia, which entered the war automatically as part of the British Empire. During the war, Australian forces gradually came under Australian command and at the end of the war, Australia insisted on its own seat at the peace conference.

## World War Two (WWII)

Yugoslavia was invaded by the Axis in 1941. Their expulsion was followed by a civil war from which the communist Partizans led by Josip Broz Tito who emerged triumphant. The Kingdom was abolished and replaced by a Socialist Republic of Yugoslavia which became the Socialist Federal Republic of Yugoslavia in 1963.

Many Yugoslavs were displaced by the war and sought new homes in other parts of the world. Large numbers of Yugoslavs, including Slovenes, found their way to Australia. Australia's White Australia Policy was still in place until the late 1960s. The racial exclusion of the indigenous people had not improved, but in 1967, a referendum brought them under the jurisdiction of the Commonwealth enabling potentially significant improvement. Australia was on the march of nation building, and expanding economically. The influx of people from Europe also increased Australia's cultural diversity.

The 1946 constitution of Yugoslavia<sup>14</sup> provided the basis for the rights and duties of its citizens. Most notable, was the introduction of Article 21 that ensured there was equality before the law of all citizens (men and women) no matter what race or nationality. The right to elect and be elected, along with equal rights for women, the right to education, and the freedom of conscience, religion, the protection of the family, and the freedom of speech, association, assembly<sup>15</sup> could be considered progressive law for its time. These rights went some way to unifying the citizens

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<sup>13</sup> Sotirovič (2014, pp. 2–6).

<sup>14</sup> Ustava FLRJ, Official Gazette FLRJ, No. 10/46. Citizenship Act of the Peoples Republic of Slovenia, Official Gazette of the Democratic Republic of Yugoslavia 64/1945.

<sup>15</sup> Haug Hilde (2012).

of Yugoslavia. The Slovene people finally got their own Republic constitution that went some way to providing the foundations of not only the current day territory of Slovenia, but also, the democratic rights they enjoy today. Importantly, the constitution enabled the Republics to enjoy the right to and protection of their own cultural development and the free use of their own language.<sup>16</sup> Apart from Slovene's being able to strengthen their identity, the human rights discourse was about to take a turn for the better, across the world. In 1948, the Universal Declaration on Human Rights was proclaimed. The Declaration has and continues to influence human rights not only across Europe and Slovenia, but also Australia.

Since 1948, there have been a number of legal instruments established to promote and protect people's human rights and fundamental freedoms. These include, the International Convention on the Elimination of all Forms of Racial Discrimination 1965 and International Covenant on Civil and Political Rights 1966.<sup>17</sup> These international legal instruments have all assisted in shaping Slovenian and Australian human rights law. Small steps had been taken by the Australian Government to consider the indigenous peoples during the 1960s. The *Commonwealth Electoral Act 1962* was introduced to allow Aboriginal people to enroll and vote as electors of the Commonwealth.<sup>18</sup> Despite the international law for human rights having a greater influence on human rights law and policy generally, it is arguable, whether these instruments were the catalyst for Australia finally amending the Constitution in 1967. Although, the promulgation of the International Covenant on Civil and Political Rights in 1966 seems significant. In 1967, Australia had a Referendum resulting in the change to the Australian Constitution.<sup>19</sup> Sections 51 (xxvi) and 127 were amended to extend the race power to the indigenous peoples and to include them in the consensus. In practice, many indigenous people are still marginalized, but the legal barriers to progress have been reduced.

## The Development of Human Rights

Post WWII there were three waves that had an impact on a states' human rights law and policy. The first was the struggle for decolonization between 1948 and 1965. The second phase<sup>20</sup> saw the struggle against racial segregation and discrimination, and the third phase was the struggle of multiculturalism and the rights of minorities. The European Community began to take a greater role in cooperation amongst states with the European Coal and Steel Community being established in 1951. The founding members included Belgium, France, Germany, Italy, Luxembourg and the

<sup>16</sup> Yugoslav Constitution of 1946 Article III, section 9.

<sup>17</sup> International Covenant on Economic, Social and Cultural Rights 1966, adopted by UN General Assembly resolution 2200A (XXI), 16 December 1966, entry into force 3 January 1976, Treaty Series, vol. 993, p. 3. Convention on the Elimination of All Forms of Discrimination Against Women, adopted by UN General Assembly resolution 34/180 18 December 1979, entry into force 3 September 1981, Treaty Series, vol. 1249, 13.

<sup>18</sup> *Commonwealth Electoral Act, No. 31, 1962*.

<sup>19</sup> Constitution of the Commonwealth. Section 51.

<sup>20</sup> Kymlicka (2012, p. 6).

Netherlands. The evolution of the European Community, European human rights would take center stage, with the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950.<sup>21</sup>

The second world war had ended, and the economic development and influence of the West would continue to dominate the world order, with human rights increasingly becoming part of the political discourse. However, communism still reined in certain countries and regions of the world. During the 1970s–1980s, the Australian Government changed its course on migration policy and allowed greater diversity of people into the country, particularly from South East Asia. The former [Bob] Hawke government in 1983 described national identity as being multicultural, with the country needing to embrace its cultural diversity.<sup>22</sup> Michael Barnes<sup>23</sup> argues that the global conditions and government policy at the time began to threaten the Anglo-Celtic identity of Australia. The White Australia Policy had been disbanded, and Australia began to welcome people from South Asia. This would mark a significant shift in direction and influence in the way Australia would accept different races and cultures into the country. Even so, the plight of the indigenous people had not improved all that much. This shift did influence the acceptance and implementation of human rights. In order to expand multiculturalism, greater racial inclusiveness was required.

Slovenia, on the other hand was moving towards independence. Following the death of Joseph Broz Tito (the former leader of Yugoslavia), Yugoslavia began the road to breakup. The Berlin Wall was dismantled and communism collapsed. Slovenia would separate from Yugoslavia, and in doing so, had the opportunity to establish a modern day constitution. In 1990, the Draft Slovenian Constitution<sup>24</sup> was published and the Declaration of Sovereignty of the Republic of Slovenia was proclaimed.<sup>25</sup> The Slovenian Assembly passed the constitutional amendments XCVI–XCVIII in 1990, which invalidated all constitutional laws of the Socialist Federal Republic of Yugoslavia (that were not in conformity with the Slovenian Constitution).<sup>26</sup> On 25 June 1990, the Basic Constitutional Charter was promulgated the Republic of Slovenia was established as a sovereign state. The people of Slovenia decided that they no longer wanted to be part of Yugoslavia, which was expressed in the Statement of Good Intentions on 6 December 1990<sup>27</sup> [that stated]: “*Through the will expressed in the plebiscite by the Slovene nation, the Italian and Hungarian ethnic communities and all other voters in the Republic of Slovenia, Slovenia may finally and actually become a sovereign, democratic and social state based on the rule of law*”.<sup>28</sup>

<sup>21</sup> Convention for the Protection of Human Rights and Fundamental Freedoms. *Rome, 4.XI.1950*.

<sup>22</sup> Barnes (2004, pp. 1–20).

<sup>23</sup> Ibid.

<sup>24</sup> Jambrek (2014, p. 5).

<sup>25</sup> Ibid, Official Gazette of the SFRY, 41/1991.

<sup>26</sup> Ibid.

<sup>27</sup> Kogovsek and Pignoni (2007).

<sup>28</sup> Ibid.

The Statement of Good Intentions, the new constitution and independence all influenced and shaped the new found human rights (law and policy) of the new Slovenia. Independence, provided the Slovene the opportunity to truly express, for the first time in history that they have a single identity (language, culture and values) that sets them apart from every other race and ethnic group in the world. Embracing democracy and the rule of law saw Slovenia move back to Europe and the beginnings of the state strengthening human rights according to international and European norms.

During the same period Australia, had some significant developments. The Bicentenary of colonization was celebrated in 1988, but this also brought protests from indigenous groups that their invasion and dispossession was not a cause for celebration.<sup>29</sup> This led to movement for “Reconciliation”, a nebulous term that tried to express an improved relationship between indigenous and non-indigenous people. In 1992, the High Court handed down the historic Mabo judgment that held that indigenous land title had survived European occupation and could now be claimed.<sup>30</sup> On 10 December, 1992 Prime Minister Paul Keating delivered his “Redfern” speech acknowledging the impact of European occupation on indigenous people and recognizing that they must have a greater role in Australia’s future.<sup>31</sup> In 1995, the Commonwealth initiated an inquiry into the removal of indigenous children from their families. This led to the “Bringing them Home” report of 1997. However, the election of the Howard conservative government in 1996 led to some backward steps in reconciliation and human rights protection. For example, Australia declined to enter a framework agreement with the European Union because it contained a human rights clause.<sup>32</sup>

## European Union

The European Union (EU) human rights law has largely developed following the 1948 Declaration of Human Rights. Since then, the rise and development of human rights in Europe has had such a significant influence not only across all member states, including Slovenia, but also other countries. This includes Australia. The EU has been one of the most complex modern political projects ever undertaken, and has been portrayed as a symbol of unity.<sup>33</sup> The 1950 European Convention on Human Rights and Fundamental Freedoms (ECRFF)<sup>34</sup> and more recently

<sup>29</sup> Irving (1997, p. 100).

<sup>30</sup> Ibid.

<sup>31</sup> Redfern Speech (Year for the World’s Indigenous People), Prime Minister Paul Keating, 1992, [https://antar.org.au/sites/default/files/paul\\_keating\\_speech\\_transcript.pdf](https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf), Accessed 21 August 2015.

<sup>32</sup> Harvey and Longo (2008, p. 116).

<sup>33</sup> Walters and Bohnic (2015, pp. 83–102).

<sup>34</sup> Act ratifying the Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 3, 5 and 8 and amended by Protocol No. 2 and its Protocols Nos. 1, 4, 6, 7, 9, 10 and 11, Zakon o ratifikaciji Konvencije o varstvu človekovih in temeljnih svobodščin, spremenjene s protokoli št. 3, 5 in 8 ter dopolnjene s protokolom št. 2, ter njenih protokolov št. 1, 4, 6, 7, 9, 10 in 11, Official Gazette Republic of Slovenia Treaties, MP, No. 7/94.



the European Charter of Fundamental Rights (ECFR) 2000, direct the current day human rights laws of member states of the European Union. This unity has resulted in the shared sovereignty and unity.<sup>35</sup> The unity developed by the EU is no more evident than the rights and responsibilities that have been afforded to all citizens of all member states. The initial steps to establishing common rights and responsibilities for citizens of the EU can be found in the 1951 Treaty establishing the European Coal and Steel Community (ECSC)<sup>36</sup> which expired in 2002. Apart from building a closer community, the beginnings of the recognition of women can also be found in the ECSC, which promoted the idea of equal pay for equal work.<sup>37</sup> On paper there was no separation or discrimination between men and women, thus it could be argued the principle of equal pay for equal work applied to both. However, in practice this may have been very different. The principal objective was to unite countries and their people and encourage cooperation. In 1957, the Treaty of Rome, significantly extended the ECSC and introduced the right of “free movement of persons and services”.<sup>38</sup> Citizens from Iceland, Lichtenstein and Norway who make up the European Economic Area have also been included and are able to freely work and reside in other EU member states (MS).

In 1968, Council Regulation 1612/68 was introduced to distinguish between free movement and mobility of labour. Free movement constituted the right of a worker and their family to move, reside and work across the EU.<sup>39</sup> As the European Union was taking shape, there were further advances in the recognition of women in international law pertaining to nationality reinforcing Article 119 of the ECSC that equal pay for men and women<sup>40</sup> was important to the growth, unification and integration of the Union, along with expanding the idea of democratic values. In 1979, the Convention on the Elimination of all Forms of Discrimination against Women<sup>41</sup> was established and ratified by Australia in 1983<sup>42</sup> and Yugoslavia (Slovenia) in 1982.<sup>43</sup> Article 9 states that women shall be granted equal rights with men to acquire, change or retain their nationality, and that a women would not lose her nationality upon her husband changing his nationality. The slow progress to equality was well underway

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<sup>35</sup> Ibid.

<sup>36</sup> Treaty establishing the European Coal and Steel Community 1951 <http://www.consilium.europa.eu/uedocs/cmsUpload/Community.pdf>, Accessed 1 February 2018.

<sup>37</sup> Ibid, article 119.

<sup>38</sup> Article 3 and Title III, The Treaty of Rome, 25 March 1957, [http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf), Accessed 1 February 2018.

<sup>39</sup> Council Regulation 1612/68, on freedom of movement of workers within the Community, Official Journal of the European Communities L 257/2.

<sup>40</sup> Council Directive 76/207/EEC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal of the European Community L 39.

<sup>41</sup> Convention on the Elimination of all Forms of Discrimination against Women, Treaty Series, vol. 1249, 13.

<sup>42</sup> Australia Human Rights Commission, <https://www.humanrights.gov.au/convention-elimination-all-forms-discrimination-against-women-cedaw-sex-discrimination-international>, Accessed 28 June 2018.

<sup>43</sup> Slovenia automatically assumed ratification of independence, Notification of succession in respect of United Nations Conventions and conventions adopted by IAEA.

and states began to reflect this in their legal frameworks. The Schengen Agreement (SA), signed in 1985. The SA gave effect to the principle of free movement through the abolition of internal frontiers and the introduction of common conditions for the entry of third country nationals into (Schengen Zone of the European Union) member states. In 1986, the Single European Act (SEA) was implemented.<sup>44</sup> The SEA reinforced the ‘internal market’ concept by allowing EU citizens to move, reside and work freely across the European Union, ensuring the area was without any internal frontiers.<sup>45</sup> The SEA while not directly expanding the rights of Slovenes of Australian’s, it would later allow citizens from these states to move freely across the European Union. In 1992, the Maastricht Treaty (MT), was signed.<sup>46</sup> The MT created the European Union (EU) itself, and also created European Union citizenship.<sup>47</sup> However, it had little to do directly with human rights. Although, its influence in human rights across the European Union would be enormous, because finally citizens of member states, would automatically become a citizen of the Union. This recognition expanded the rights of European citizens.

The single European currency was also established by the MT and came into effect in 1999. For instance, a Union citizen not resident in their state of origin can vote and stand for election in another member state. A third country national such as an Australian citizen cannot vote or stand for election in Slovenia. Likewise, a Slovenian citizen resident in Australia cannot vote or stand for elections. Thus, the difference in rights afforded to residents and citizens are subtle but are very important for a citizen to be fully active in the political community. Human rights are afforded to all citizens who have citizenship<sup>48</sup> of a state and in the case of Slovenia, also part of the supranational polity. Human rights and citizenship have long been entwined<sup>49</sup> and assist states and supranational polity to build an inclusive society. That inclusiveness at a state level contributes to a sense of belonging that forms part of national identity. However, in practice the implementation of rights may differ. For example, in Australia, although there has been formal recognition of the equality of indigenous people, there has been and continues to be exclusion and disadvantage of indigenous Australians in health, education and life chances.

In 1997, the Treaty of Amsterdam (AT) followed the MT, and provided greater recognition of European Union citizenship, immigration, asylum and the inclusion of references to refugees. The AT would also provide greater economic and social activity through the single currency that can be seen today in Slovenia, with the Euro being the only currency used by most EU member states (MS). The resulting affect to human rights was negligible, how symbolically having a single currency (apart

<sup>44</sup> Single European Act 1986, Official Journal of the European Communities L 169.

<sup>45</sup> Ibid, section II, Article 13 EEC Treaty, Article 8a.

<sup>46</sup> Article A, Maastricht Treaty 1992, Official Journal of the European Union C 191.

<sup>47</sup> Ibid, article 8, states citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby, <http://www.eurotreaties.com/maastrichtec.pdf>, Accessed 20 April 2012.

<sup>48</sup> Bosniak (2006, pp. 17–20).

<sup>49</sup> Nash (2009, pp. 1067–1083).

from the economic and single market policy focus), provides greater economic equality across the Union. Apart from reinforcing the earlier principle of equal pay<sup>50</sup> for all that had been established by the ECSC in 1957, the AT promoted gender equality across all activities in the Community. In reinforcing these earlier rights afforded to citizens, the AT affirmed that the European Union had been founded on key democratic principles that include the right to liberty, respect for human rights and fundamental freedom, the rule of law, and guaranteeing the protection of those rights established by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>51</sup> The Treaty of Nice (TN) followed the AT in 2001.<sup>52</sup> The TN was to prepare the EU for the accession of the Central and East European countries such as Slovenia, and it reinforced the right to move and reside freely within the territory of any MS.<sup>53</sup> It was also notable for the adoption of the European Charter of Fundamental Rights 2000, but on a political rather than legally binding basis. In 2004, the European Council approved the Constitutional Treaty (CT),<sup>54</sup> which was signed by the then twenty-five MS. On 1 February 2005, the Slovenian Parliament ratified the CT.<sup>55</sup> However, the constitution was rejected by the citizens of France and the Netherlands. After the failure of the Constitutional Treaty, the Lisbon Treaty (LT) was signed in late 2007.

More importantly, the treaty formally recognized and guaranteed rights to citizens, including reference to the European Union Charter of Fundamental Rights of 2000, as well as referring to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>56</sup> That guarantee extended to all citizens of the community and did not separate sexes. Even though Slovenia did not become a member of the EU until 2004, their first constitution in 1991 reflected many elements of the EU human rights framework. It is outside the scope of this paper to examine what constitutional rights were expressed in the Slovenian constitution, upon independence. Upon Slovenia becoming a member of the EU in 2004, Slovenes assumed citizenship of the Union<sup>57</sup> which has brought with it additional rights and responsibilities. These rights and responsibilities afforded to Slovene citizens with their new found acceptance into the European community are consistent with being a member of a political community.<sup>58</sup>

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<sup>50</sup> Article 137 and 141, Amsterdam Treaty, Official Journal of the European Union C 340.

<sup>51</sup> *Ibid*, Article 6.

<sup>52</sup> Treaty of Nice 2001, Official Journal of the European Union C 80/1.

<sup>53</sup> *Ibid*, article 18.

<sup>54</sup> Treaty establishing the Constitution for Europe, Official Journal of the European Union C 310.

<sup>55</sup> Act ratifying the Treaty on the Constitution for Europe and the Final Act, Official Gazette Republic of Slovenia, No. 1/2005.

<sup>56</sup> *Ibid*, article 6.

<sup>57</sup> Article 20, Treaty on the Functioning of the European Union, Official Journal of the European Union 2012/C 326/01, Volume 55, 26 October 2012, Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

<sup>58</sup> Weil (2001, pp. 15–40).

Moreover, the rights framework established by the EU promotes and protects political citizenship, allowing women to have a greater say and participation in the political discourse of the Union. The Slovenian Constitutional Court in U-I-109/10<sup>59</sup> ruled that the European Union Charter of Fundamental Rights became binding law of the EU, protecting the rights of all citizens of the Union, including Slovenians. The treaty also created a common immigration and asylum policy<sup>60</sup> that focused on border checks,<sup>61</sup> subsidiary and temporary protection and migration flows. Additionally, conditions of entry and residence, rights of non-citizens and the protection of individuals subject to people trafficking and illegal immigration were introduced.<sup>62</sup> Furthermore, the LT, rather than making reference to the ‘people’ as it did when discussing the role of the European Parliament, now refers to the ‘citizens’.<sup>63</sup> The LT provides an ‘identity clause’ that builds on the express duty to respect national identities that was introduced by the Maastricht Treaty.

The establishment of European Law, the European Union and European Commission is what John Rawls would define as an ordered society where ‘everyone accepts and knows that the others accept the same principles of justice and that the basic social institutions generally satisfy and are generally known to satisfy these principles’.<sup>64</sup> The same can be said of Australia and Slovenia, which have established a well ordered societies through strong institutions and the rule of law that protect, guide, direct and enhance participation of their respective citizens, within and outside the state. Today, both Australia and Slovenia have developed strong democratic legal frameworks that allow their citizens to obtain citizenship, contribute to the state and the global community, which is an element of national identity. The European Union had an opportunity, but failed to strengthen the identity with the proposed constitution.

Throughout this period, Slovenia had to grapple with many economic and social issues. None was no more important than the inclusion and exclusion of former Yugoslav citizens who had resided on the Slovene territory at the time of independence. At the time of the Yugoslavian break up, it was thought that the Slovenian territory was populated with about 90% Slovenes and the remaining 10% of the population was made up of Croats, Serbians, Bosnians and others.<sup>65</sup> Many of the 10% of people who were not Slovene, had only found themselves resident in Slovenia, because under the former Yugoslav state, citizens were able to freely move and reside anywhere. According to Neza Salamon at the time of Yugoslavia’s break up there were approximately 200,000 people residing in the Slovenian territory that were from other Yugoslav Republics, and it was confirmed that 170,000 people did obtain Slovene citizenship upon application.<sup>66</sup> Yelka Zorn estimates that there

<sup>59</sup> Official Gazette of the Republic of Slovenia 78/2011.

<sup>60</sup> Chapter 2, Consolidated Versions of the Treaty of the European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, 2010.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Article 10, Treaty of Lisbon, Official Journal of the European Union, C 83/171, 2010.

<sup>64</sup> Rawls (2005, pp. 4–6).

<sup>65</sup> Lak (1992, pp. 175–185).

<sup>66</sup> Kogovšek (2001, pp. 27–29).

were 18,305 people that were erased from the residency register. The ratio of men to women being excluded was estimated at 58% and 42% respectively.<sup>67</sup> Even though there was a choice and the ability for people to apply for citizenship, Janja Zitnik argues many people did not know or in some cases chose not to apply.<sup>68</sup> This lack of knowledge and failure of the then government to adequately inform people of the new citizenship laws was problematic. Had the government implemented a comprehensive program to ensure everyone had knowledge of and understood the new citizenship laws, the result may have been very different. Between 1992 and 2012 there were a number of decisions made by the Slovenian Constitutional Court in relation to the Erased people. The Constitutional Court ruled twice that the revoking of citizenship was illegal, in 1999 and again in 2003. The court stated that those affected should have their status of permanent resident reinstated retroactively from the day the records were deleted. However, in 2010 the European Court of Human Rights (ECoHR) got involved. As a result of individuals making an application to the court under article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The ECoHR found in favour of *Kuric*<sup>69</sup> ruling that the Slovenian government had failed to issue residency permits and amend the legislation. In 2012, the ECoHR would further consider the case of *Kuric*,<sup>70</sup> and ruled Slovenia had violated articles 8, 13 and 14 of the 1950 ECtHR. It wasn't until 2014 that the Grand Chamber of the ECtHR made the final judgment in relation to the 'Erased' by awarding €250,000 to human rights protestors (the group who applied to the court) who lost their permanent residence upon Slovenia becoming independent.<sup>71</sup> It is worth noting that the decision of the ECtHR is final and there is no appeals process for either party. It took nearly 15 years for the 'Erased' issue to conclude, and it wasn't until the European Court of Human Rights stepped in that the matter was finalized. The influence of the human rights issues from the Erased people in Slovenia, highlighted the complexities involved when new states emerge from former states, and people who were afforded rights under the former state, had their rights removed. In this case residency as a result of citizenship. No such issue has arisen in Australia, though the practice of deporting individuals to their countries of birth who came to Australia as children, who never took citizenship but committed crimes has some resemblance.

The EU human rights legal framework, jurisprudence and law has also influenced Australia's response to human rights law. That is, Australia has looked to the EU for guidance on jurisprudence and law in relation to human rights. In *Dietrich*<sup>72</sup> the High Court of Australia referred to the European Court of Human Rights (ECtHR)

<sup>67</sup> Impact to Women from being Erased, statistics [www.mirvni-institut.si8/izbrisani/en/statistics](http://www.mirvni-institut.si8/izbrisani/en/statistics), Accessed 20 August 2017.

<sup>68</sup> Žitnik (2004).

<sup>69</sup> *Kuric and Others v. Slovenia*, European Court of Human Rights, 26828/06.

<sup>70</sup> *Ibid.*

<sup>71</sup> Council of Europe, Human Rights Europe, <http://www.humanrightseurope.org/2014/03/slovenia-erase-d-people-human-rights-protest-leads-to-e250000-award>, Accessed 6 December 2014.

<sup>72</sup> *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292.

and Article 6 of the ECRFF when determining what constituted the right to a fair trial. The court noted that the 1950 European Convention for the Protection of Human Rights contains basic minimal rights for an accused to have adequate time to facilitate the preparation of their defense. Justice Michael Kirby<sup>73</sup> highlights that there have been many occasions where the Australian courts have looked to the European Court of Human Rights in Strasbourg for reference and guidance in relation to human rights (free speech, the right to fair trial) law. This is an important point, because Australia only has a Human Rights Commissioner, who oversees the implementation and practice of human rights in the country. Whereas, for Slovenia, they not only have EU law, but also, the European Court of Human Rights, which can be best described as a leader in developing human rights law and jurisprudence—globally. Furthermore, within, Australia, the Australian Capital Territory and State of Victoria have both established the *Human Rights Act 2004* and the *Charter for Human Rights Act 2006* respectively. The development of the Victorian Charter resulted in a lot of consultation and understanding of the European human rights law.<sup>74</sup> Domestically throughout the decade of 2000–2010, Australia was grappling with multiculturalism. There were riots in Sydney, which spread to other parts of the country, with people expressing their displeasure at the perception of some ethnic groups in the community not conforming to the Australian way. The distinction was made between people born in the country to those who were not ('we grew here you flew here and go home'). This attitude by some had seen the rise of xenophobic behavior creeping into the community.<sup>75</sup> Apart from identifying the lack of understanding from all sectors of the community in relation to the different cultural mix that makes up the Australian society, what stood out was the complex position that government policy had taken. For more than 50 years Australia had opened its doors to migrants, while at the same time holding on to its identity and historical connection to Britain. This balance will continue in Australia as it allows large numbers of immigrants to enter and reside in the country annually. Xenophobic behavior and race violence is not limited to Australia and has also been present across Europe and in smaller pockets of Slovenia. Xenophobic behavior in Slovenia has largely occurred in the workplace in the form of discrimination.<sup>76</sup> Similar xenophobic behavior is evident across Slovenia, not only towards individuals from former Yugoslavia, but more recently the large influx of refugees that migrated through the state, raised concerns across the community. Australia's traditional 'white' policy officially lasted for more than 50 years.

Slovenia, by establishing a modern day constitution not only recognized their citizens, but also, the other inhabitants of the territory such as the national communities of Italy and Hungary, and provided a special status of the Rom community.

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<sup>73</sup> The Hon Justice Michael Kirby AC CMG, Australia's Growing Debt to the European Court of Human Rights, The Seventh FIAT JUSTICIA Lecture, Monash University, Faculty of Law 2008.

<sup>74</sup> The Victorian Charter of Human Rights and Responsibilities, [www.humanrightscommission.vic.gov.au/...rights.../1838\\_229730fbdd853ed92de6e9](http://www.humanrightscommission.vic.gov.au/...rights.../1838_229730fbdd853ed92de6e9), Accessed 2 October 2017.

<sup>75</sup> Due and Rigs (2008, pp. 1–5).

<sup>76</sup> European Union, Report on Racism and Xenophobia in Member States, European Union Agency for Fundamental Rights, 2007.

The Rom community has resided on parts of the Slovenian territory since the 17th century.<sup>77</sup>

Since Slovenia's independence, they have managed to change the constitution on 8 occasions. The most recent occurred in 2016, when Slovenia became the first country in Europe and the world to provide for the right to access water. On the other hand, in more than 100 years Australia has attempted to change its constitution more than 40 times, with only 8 amendments being successful through referendum. The ability for a state to change its constitution reflects the political and social discourse of the nation. Australia, when compared to Slovenia has a much tougher political process to undertake, in order for the constitution to be changed. It must be approved by the parliament then undertaken through a referendum which obtains both an overall majority and a majority in a majority of States (four out of six). The next section discusses the some of the important rights expressed within the Slovene and Australian constitutions.

## Rights and Freedoms

The acceptance of particularly local Italian, Austrian, Hungarian communities and Rom people that make up the Slovene population have greater protections under the modern day constitution. This section highlights some of those basic rights and freedoms. In contrast, Australia's constitution has barely changed. The rights and freedoms afforded by constitutions are a reflection of both states historical beginnings and modern day practice of human rights that are influenced by international, regional and national law. The basic rights afforded to individuals under the Slovenian constitution<sup>78</sup> include equality before the law;<sup>79</sup> the exercise and limitation of rights;<sup>80</sup> the temporary suspension or restrictions of rights;<sup>81</sup> equality in the protection of rights;<sup>82</sup> and due process of the law.<sup>83</sup> The most important provisions of the Slovenian constitution include the protection of human rights against possible repressive state interventions against abuse of power,<sup>84</sup> and the protection of economic, social and cultural rights.<sup>85</sup> Australia's constitution does not reflect the same. The Australian constitution has both expressed and implied human rights and freedoms. The express rights have been limited to the right to vote,<sup>86</sup> with the right to

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<sup>77</sup> Stropnik (2011, pp. 1–3).

<sup>78</sup> Mavčič et al. (2012).

<sup>79</sup> Article 14, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16.

<sup>80</sup> Ibid, Article 15.

<sup>81</sup> Ibid, Article 16.

<sup>82</sup> Ibid, Article 22.

<sup>83</sup> Ibid, Article 23.

<sup>84</sup> Ibid, Articles 16, 17, 18–31, 34–38.

<sup>85</sup> Ibid, Part II.

<sup>86</sup> Australian Constitution 1900, s 41. *R v Pearson*; *Ex parte Sipka* (1983) 152 CLR 254. *Kingsville v The Queen* (1985) 159 CLR 264. *Cheatle v The Queen* (1993) 177 CLR 541.



trial by jury being another expressed right.<sup>87</sup> However, this is restricted to where there is a trial by indictment.<sup>88</sup> Freedom of religion can be found in section 116 of the Australian constitution<sup>89</sup> and applies to any religion and religious observance.<sup>90</sup> However, these rights and freedoms have largely remained unchanged since Australia implemented the Constitution in 1901. George Williams and David Hume argue that there is an expanded list of rights and protections whereby the Commonwealth is prohibited from discriminating between states. These include; protecting public servants that have been transferred from the state to the Commonwealth and prohibiting the Commonwealth from preferencing one state over another in trade and commerce. Additionally, the Commonwealth is prohibited from abridging the right of a state or the residents of a state to the reasonable use of water. Changing the constitution cannot be undertaken without the consent of the electors.<sup>91</sup> The 'implied' rights and freedoms can be summarized as the freedom of political communication,<sup>92</sup> the freedom of movement, association and speech.<sup>93</sup> Even though these rights and freedoms have not been explicitly expressed in the Australian constitution, the High Court of Australia has ruled that these rights do exist.

The Slovenian constitution<sup>94</sup> distinguishes between two groups to whom the rights apply. The first group applies to everyone<sup>95</sup> (including citizens and residents in the territory) and the second group only applies to Slovene citizens.<sup>96</sup> Australia's constitution does not make the same distinction. One area that sets Australia and Slovenia apart is the recognition of ethnic communities. Apart from Slovenia ensuring continuity of Slovenians upon independence, the ethnic communities of Italy and Hungary were also afforded the same recognition.<sup>97</sup> Raising the status of these minorities to national communities strengthened their participation in the state by allowing them to vote and stand for election. This has similarities with an individual having the status of citizenship or residence. Residence status does not allow a person to vote or stand for election. Article 65 of the Slovenian constitution provides special rights for those Italian and Hungarian national communities<sup>98</sup> residing in Slovene territory, and for those individuals determined to be part of the Rom community.<sup>99</sup> The autochthonous Italian and Hungarian national

<sup>87</sup> Australian Constitution 1900, s 80.

<sup>88</sup> *R v Bernasconi* (1915) 19 CLR 629.

<sup>89</sup> Constitution of Australia 1900, s116.

<sup>90</sup> *Adelaide Company of Jehovah's Witness Inc v Commonwealth* (1943) 67 CLR 116.

<sup>91</sup> Australian Constitution, sections 84, 99, 100, 128.

<sup>92</sup> *Kruger v Commonwealth* (Stolen Generation Case) (1997) 190 CLR 1.

<sup>93</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 212.

<sup>94</sup> Mavčič (2008, pp. 1–18).

<sup>95</sup> Part II, Slovenian Constitution, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16.

<sup>96</sup> *Ibid.*

<sup>97</sup> Lipott (2013, pp. 65–70).

<sup>98</sup> The Slovenian Constitution, Official Gazette of the Republic of Slovenia, 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 64 and 65.

<sup>99</sup> Mavčič (1998, pp. 249–260).



communities<sup>100</sup> (and their members) are guaranteed the right to use their national symbols freely and, preserve their identity. These national communities also have the right to establish organizations and develop economic, cultural, scientific and research activities. It must be noted that the national communities of Hungary and Italy are afforded quite different rights and freedoms to that of the Rom community under national laws. Additionally, these national communities have the right to education and schooling in their own languages, education and media.<sup>101</sup> Article 61 of the Slovenian constitution provides a broader right for individuals resident in Slovenia to express their affiliation with their own nation and national community. Slovenia, unlike Australia, borders Italy, Austria, Hungary and Croatia. Many Slovene, Italian, Hungarian, Austrian and Croatian communities have resided on the border regions for centuries. Over the centuries, the borders have evolved and changed. Hence, there has been a commitment to ensure the people in these regions are not affected, and able to retain their identity through the use and practice of language and religion. Slovenia has done its part by guaranteeing the rights of these minority groups resident on the territory.<sup>102</sup> Australia, on the other hand is surrounded by sea and has no land based border with any other country. The Rom people are a different category again, as they have been roaming across eastern and southeastern parts of Europe for centuries. Arne Mavčič argues this was a deliberate inclusion by the constitutional drafters to protect individuals from the former Yugoslav Republics. Arguably, the constitutional recognition of the Rom and national communities is an important component of continued unification and integration of these people within Slovenia. This guarantee is important to individuals in retaining their national and personal identity. The next section highlights some examples of how each state reflects certain human rights within their respective legal frameworks.

## Dignity, Freedoms, Citizens' Rights, Equality and Justice

Dignity is considered and respected in criminal proceedings.<sup>103</sup> The Slovenian Constitutional Court ruled that human dignity is a fundamental part of human rights and is the legal-ethical essence of the constitutions of democratic states.<sup>104</sup> The Australian High Court has taken a similar approach by stating that "a human right may be subject to the law only to such reasonable limits as can be demonstrably justified in

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<sup>100</sup> U-I-267/09-11-2-2010, Official Gazette of the Republic of Slovenia 14/2010, U-I-176/08-7-10-2010, Official Gazette of the Republic of Slovenia 84/2010, U-I-416/98-22-3-2001, Official Gazette of the Republic of Slovenia 28/01.

<sup>101</sup> Mavčič (1998, pp. 250–258).

<sup>102</sup> The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 62.

<sup>103</sup> The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 21 and 34.

<sup>104</sup> Slovenian Constitutional Court, U-I-109/10, Official Gazette of the Republic of Slovenia 78/2011.

a free and democratic society based on human dignity”.<sup>105</sup> The Australian constitution makes no express reference to the legal concept. Slavery<sup>106</sup> is closely associated with torture. Freedom from slavery is one of the oldest protections that has been recognized by the international community. It dates back to the 1885 Berlin Treaty and the 1926 International Convention to Suppress the Slave Trade and Slavery. Rather than establish slavery as a constitutional right or protection, Slovenia<sup>107</sup> and Australia<sup>108</sup> have criminalized the principle. The High Court of Australia stated that the definition of slavery is based on the definition in the 1926 Slavery Convention.<sup>109</sup>

Freedoms are an important part of a citizen ability to participate in society and includes personal liberty, respect of private and family life, right to marry and have a family, freedom of thought and conscious.<sup>110</sup> The Australian High Court argued ‘the right to personal liberty is the most elementary and important of all common law rights.’<sup>111</sup> The right has no Australian constitutional recognition. Article 19 of the Slovenian constitution allows the state to restrict liberties under national legislation.<sup>112</sup> Furthermore, privacy is fast becoming one of the most important legal and policy issues for governments and society. The rise in technology has seen an explosion in the ability for organizations to collect and use individual’s personal data. The Lisbon Treaty<sup>113</sup> has reinforced Article 8 of the European Charter of Fundamental Rights 2000 and Article 37 and 38 of the Slovenian Constitution provides that the protection of personal data and an individual’s privacy. There no express constitutional right in Australia. However, it must be noted that privacy and data protection in the early 1900s at the time the Australian constitution came into effect, was very different to today. This was also reaffirmed by the Slovenian Constitutional Court in 1992.<sup>114</sup> In Australia, the protection of privacy and personal data falls within the *Privacy Act 1988 (Cth)*. The Australian High Court stated, the origin of this right can be found in Article 17<sup>115</sup> of the International Convention on Civil and Political Rights.<sup>116</sup> Slovenia and Australia apply the right to asylum consistently and in accordance with the 1951 Refugee Convention and 1967 Protocol. There is no constitutional right of asylum in Australia but rather section 51(xix) and (xxvii) of

<sup>105</sup> *Momcilovic v The Queen* (2011) HCA 34, 165.

<sup>106</sup> Article 8, International Covenant on Civil and Political Rights 1976, adopted by the UN General Assembly resolution 2200A (XXII) 16 December 1966, entry into force on 23 March 1976, Treaty Series, vol. 999, p 171 and vol. 1057, p. 4077.

<sup>107</sup> Slovenian Criminal Code Act, Official Gazette of the Republic of Slovenia 1/2008, Articles 101–102.

<sup>108</sup> Divisions 270, *Commonwealth Criminal Code Act 1995*. Section 245AH of the *Migration Act 1958*.

<sup>109</sup> *The Queen v Tang* (2008) HCA 39, Order 33.

<sup>110</sup> The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 41.

<sup>111</sup> *Williams v The Queen* (1987) HCA 36; 161 CLR 278, 292.

<sup>112</sup> The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 19(3).

<sup>113</sup> Lisbon Treaty, Official Journal of the European Union C 36, Article 39.

<sup>114</sup> U-I-115/92, Official Gazette of the RS, No. 3/93. Article 38 of the constitution ensure the right to the protection of personal data.

<sup>115</sup> Article 17 (1) and (2) International Convention on Civil and Political Rights 1966.

<sup>116</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

the constitution provides the parliament with the power to make laws in relation to aliens.<sup>117</sup> Asylum seekers and refugees can be politicized by nation states. It is a divisive issue that cuts across many areas of economic and social policy.

Equality is a legal norm that is synonymous with democratic states. The legal principle has been included in Slovenian Constitution<sup>118</sup> but not the Australian Constitution.<sup>119</sup> Equality can constitute many things including discrimination or equality before the law. Throughout this paper, it has been demonstrated how the Slovene and Indigenous Aboriginal People have been excluded and discriminated against, throughout history. Article 63 of the Slovenian Constitution relates to racial and religious discrimination. Discrimination is a broad legal principle that covers physical and mental disabilities, and is closely associated with the right to religion, expression and association. This type of discrimination extends to protecting the rights of national communities of Hungarians and Italians. Furthermore, Article 300 of the Penal Code of the Republic of Slovenia determines the nature of 'stirring up Ethnic, Racial or Religious Hatred, Strife or Intolerance as a criminal offence'.<sup>120</sup> In U-I-146/07<sup>121</sup> the Slovenian Constitutional Court stated the Slovenian legal system provides no single definition of disability and is subject to individual areas of regulation, that is consistent with the second paragraph of Article 1 of the Convention on the Rights of Persons with Disabilities<sup>122</sup> (CRPD) in the same way the Australian *Disability Discrimination Act 1992* (DDA).<sup>123</sup>

The rights of citizens are different from the rights of others in Slovenia and Australia. The right to vote and stand for election<sup>124</sup> is a guaranteed and is crucial to maintaining the foundations of an effective democracy established by a constitution.<sup>125</sup> The right to vote in Australia, in federal elections, is regulated under the *Electoral Act 1918*. The Slovenian Constitution states the right exists provided the citizens wanting to vote is 18 years of age.<sup>126</sup> Whereas, section 24 of the Australian Constitution refers to the House of Representatives that the representatives can be chosen by the people of the commonwealth. Section 25 allows individual states

<sup>117</sup> *VRAW v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 113, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470. *Kontig v Federal Republic of Germany* (1978) 2 EHRR 170. *Osman v United Kingdom* (1998) 29 E.H.R.R. 245. Australia has looked to the European Court of Human Rights and borrowed the courts standard in relation to a state's obligations to protect applicants in accordance with the Refugee Convention and Protocol.

<sup>118</sup> The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 14.

<sup>119</sup> Equality before the law, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01, Article 20. The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 14.

<sup>120</sup> *Ibid.*

<sup>121</sup> U-I-146/07, Official Gazette of the Republic of Slovenia, No. 111/2008.

<sup>122</sup> Convention on the Rights of Persons with Disabilities, Treaty Series, vol. 2515, p. 3.

<sup>123</sup> Disability Discrimination Act 1992, s4.

<sup>124</sup> *Scoppola v Italy* (No.3) (Application No 126/05), 2012, 81–82.

<sup>125</sup> Williams and Hume (2013, p. 219).

<sup>126</sup> The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16, Article 43.

within Australia to exclude any race from voting at elections. Furthermore, section 41 provides an express right of electors to the states. No adult person who has or acquires the right to vote at elections, can do so, for more than one House of Parliament of a state such as Victoria. However, section 44 for the Australian Constitution restricts candidates from Federal Parliament. A person who has allegiance, obedience or adherence to a foreign power or is a citizen who has obtained rights and privileges of a foreign power cannot be chosen or sit as a Senator or member of the House of Representatives.

Finally, justice is another important fundamental right of modern day democratic states. Section 80 of the Australian Constitution guarantees a right to trial by those offences stated under Commonwealth law only. This does not apply to state or territory law (Victoria, New South Wales, Queensland, Tasmania, Western Australia, South Australia, Northern Territory and Australian Capital Territory). The difference between the Slovenian Constitution and AC is that Slovenia expresses the right to a 'fair' trial, whereas, the Australian constitution is specific to only refer to a 'trial by jury'.<sup>127</sup> The Slovenian Constitutional Court in U-I-204/99,<sup>128</sup> stated that Article 29 of the Slovene Constitution determined that anyone charged with a criminal offence must be guaranteed, in addition to absolute equality and the right to legal representation. Additionally, the Slovenian Constitutional Court in this case also ruled that the free choice of a legal representative in accordance with Article 19 of the constitution, is to be understood as an element of the general right to defense determined by Article 29. The High Court of Australia in *Dietrich*<sup>129</sup> stated the right to a fair trial while not being an express constitutional right is to be granted according to the law.<sup>130</sup> It is a legal concept that is fundamentally important in democratic societies. It ensures people have access to justice. The next section highlights the importance of religion in Australia and Slovenia, and how it has a minor influence on human rights.

## Religion

Religion has had an influence on how both Slovenia and Australia have looked to human rights. Slovenes have been influenced by the Roman Catholic Church for centuries, dating back to the Frankish (Carolingian) Empire and Roman Empire<sup>131</sup> right through to contemporary Slovenia. Slovenians and the current day Slovenian territory were on the front line of the split between Eastern and Western Christendom in 1054 and close to the frontier of the Islamic Ottoman Empire, to its south. Slovenia, unlike Serbia, was never ruled by the Ottoman Empire. A recent study confirmed that 38% of the people residing in the capital of Slovenia, Ljubljana

<sup>127</sup> *Kingswell v The Queen* (1985) 159 CLR 264.

<sup>128</sup> Official Gazette of the Republic of Slovenia, No. 3/2003.

<sup>129</sup> *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292.

<sup>130</sup> *Ibid.*

<sup>131</sup> Črnič et al. (2013, pp. 205–229).

province, are Roman Catholic, 8% follow other Christian denominations.<sup>132</sup> The Orthodox domination accounted for 7.3% of the 8%, with 4.8% of the total population being Muslim.<sup>133</sup> Australia on the other hand, has its religious roots in its Anglo-Celtic heritage and Christianity. There has been significant sectarian ill-feeling between Catholics and Protestants leading to the inclusion of a guarantee of state secularism and freedom of religion in the Commonwealth Constitution (s116). Though this does not extend to the States, they too have allowed freedom of religion in practice. The indigenous people had their own religious traditions but also accepted Christian conversion and many were forced to live on Christian missions. Since the increase in diversity of Australian immigration, Christianity is still the majority religion amongst many other religions such as Islam, Buddhism and Hinduism, amongst other faiths. Today about 60% of the population in Australia are Christian (Catholic, Anglican, Baptist, Uniting Church, Lutheran, Orthodox).<sup>134</sup> The remaining 40% of the population are practitioners of Islamic, Buddhist, Hinduism, Sikhism and Judaic faiths. Religion has helped shaped the values and identity of both states.<sup>135</sup> Thus, in Australia the religious diversity has prevented a single religion from being dominant and has given effect to secularism. Over the last 50 years we have seen human rights, with its foundation in liberalism, take a more prominent role in international relations.<sup>136</sup> Religion—whether in the form of religious terrorism, religious freedom, or religious movements—has become an element in political life that simply cannot be ignored.<sup>137</sup> Religion plays in politics and in international relations. Religious organizations and their values are important for a healthy democratic polity and for a humane world that values human rights and human diversity.<sup>138</sup> Therefore, having a greater influence on modern day human rights than some care to think about or even contemplate.

## Conclusion

Human rights law in Slovenia and Australia have taken very different paths. World and regional events have significantly influenced the way human rights had, and more recently have been adopted in both states. As society and the world has changed, states have matured, along with the world community, and the acceptance of human rights today is significantly different from 100 years ago. Moreover, the common law and civil law have had an influence on human rights, along with colonization and in the case of Slovenes, being ruled for centuries by others. The most notable similarities between the two states have been the exclusion of people on the

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Australian Bureau of Statistics, 2011 Census, 2012–2013, <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>, Accessed 30 June, 2015.

<sup>135</sup> Ibid.

<sup>136</sup> Ann Rieffer (2006, pp. 30–34).

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

territory, resulting in various forms of discrimination. To a lesser extent, religion has influenced human rights law in both states. Modern day Slovene human rights law is largely directed by the European Union and European Convention on Human Rights and Fundamental Freedoms. Australia also looks to the European Convention on Human Rights and Fundamental Freedoms and European Union for human rights jurisprudence and law. The Slovenian constitution is significantly different to the Australian constitution in expressing rights and freedoms. Yet, whether expressed in the constitution or not, Australia has a solid framework of legislation that deals with all the rights and freedoms. The constitutional foundations between the two countries are very different. Slovenia had the opportunity in 1991 to establish a modern day constitution that now reflects long standing rights and freedoms in its constitution. Australia's constitution is more than 100 years old, and while there have been attempts to change it, there is little appetite for further change despite the arguable need for major updating, especially in the area of rights protection. According to Human Rights Watch, Australia is a vibrant multicultural democracy with a strong record of protecting civil and political rights, but serious human rights issues remain. The ongoing refugee crisis and attacks by armed extremists in Belgium, France, and Germany reinforced xenophobic and anti-immigrant sentiment, manifest in attacks on Muslims, migrants, and those perceived as foreigners and support for populist anti-immigration parties in many EU states.<sup>139</sup> These issues alone, particularly mass migration will continue to challenge the way states accept or exclude, or, suppress individual's basic rights. The point is, that exclusion today, is still evident in both states, but largely for different policy reasons. Finally, in comparing these two countries, it has been demonstrated how two modern day democratic states reflect similar rights and freedoms within their respective legal frameworks despite their different histories and contexts.

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